In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-580

CHARLES CALVIN KELLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A 1-3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1971. A petition for rehearing was denied on September 27, 1971. On October 27, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

449-903—71——1

QUESTIONS PRESENTED

1. Whether petitioner's pretrial motion for severance was properly denied.

2. Whether the trial court properly denied petitioner's motion to suppress evidence.

3. Whether certain comments by the prosecutor in summation made in response to defense counsel's closing argument constituted prejudicial error.

4. Whether the presence of certain law books in the jury room during the jury's deliberation was reversible error in the circumstances of this case.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner and one James Staples were convicted of bank burglary in violation of 18 U.S.C. 2113(a). Petitioner was sentenced to ten years imprisonment. The court of appeals affirmed *per curiam*.

During the night of December 18, 1968, the Bauxite branch of the Benton State Bank, Bauxite, Arkansas,[1] was burglarized and $1,524 in coins was removed (Tr. 18).[2] At the trial, a bank employee testified that the bank's vault had been entered through a hole burned in the steel door by a cutting torch (Tr. 12–13). Vera

[1] The indictment against petitioner and his co-defendant was returned by the grand jury in the Eastern District of Arkansas. Both were residents of Pensacola, Florida, and, pursuant to their motions under Rule 21(b) Fed. R. Crim. P., the indictment was transferred for trial to the Pensacola Division of the Northern District of Florida.

[2] "Tr." designates the two-volume trial transcript which we are filing herewith.

Taylor, manager of a Little Rock, Arkansas, welding supply firm, testified that on the day of the burglary petitioner and James Staples had attempted to purchase a certain type of valve adapter used in connection with cutting torch equipment (Tr. 42–44). Mrs. Taylor notified the F.B.I. of this fact, describing the men she talked to and the vehicle they had used to leave her place of business (Tr. 42, 45, 47–48). The car was identified as having been leased from a rental agency in Pensacola, Florida by James Staples a few days before the burglary (Tr. 66).

On December 20, 1968, petitioner was arrested at his home in Pensacola, Florida, by F.B.I. agents acting under a warrant issued by a United States Commissioner in Little Rock (Tr. 128, 201). A search of petitioner's home revealed a suitcase containing two valve adapters and a large quantity of coins (Tr. 129–130, 203–206). A number of these coins were found in a canvas bag bearing the label of the Little Rock Branch of the Federal Reserve Bank of St. Louis (Tr. 131, 204).

ARGUMENT

1. Petitioner contends that the trial judge erred in denying his pretrial motion for a severance. He argues that the jury was unable to separate the evidence to determine petitioner's involvement. But the case was not complicated and involved evidence of joint participation by petitioner and his co-defendant in the same criminal transaction. Moreover, in order to avoid prejudice the trial judge instructed the jury to consider the guilt or innocence of each defendant only

upon the evidence introduced against him and to determine the verdicts separately as to each defendant (Tr. 334). In the circumstances, the denial of a severance was not an abuse of discretion. *Opper* v. *United States*, 348 U.S. 84, 95; *Gordon* v. *United States*, 438 F. 2d 858, 878–879 (C.A. 5).

2. Petitioner contends that the trial court erred in refusing to grant his motion to suppress evidence resulting from a search of his home incident to his arrest pursuant to an arrest warrant. Testimony revealed (Tr. 136) that the search was directed at the fruits and instrumentalities of the crime for which petitioner had been arrested and, as the trial court concluded, was reasonable under the circumstances (Tr. 143). It was thus valid under the law as it existed prior to this Court's decision in *Chimel* v. *California*, 395 U.S. 752, and *Chimel* was given prospective application only in *Williams* v. *United States*, 401 U.S. 646.

3. Petitioner contends that certain statements made by the prosecutor during closing argument (set forth at Pet. 7) constituted reversible error. The statements were not inherently prejudicial and were in direct response to remarks and issues raised by petitioner's counsel during his summation.[2] As such, they were permissible. *United States* v. *Vigo*, 413 F. 2d 691, 694 (C.A. 5).

[2] One remark was in response to defense counsel's argument that no fingerprints were found on tools discovered in Staple's residence. The other, more lengthy statement of defense counsel to which the prosecutor's remarks were a reply is set forth at pages 40–41 of the separate transcript containing the arguments of counsel, which we are filing herewith.

4. Petitioner contends that it was error to have denied his motion for a new trial based on the finding of law books in the jury room during the jury's deliberations. After the books—Title 18 of the United States Code and a volume of the Florida Criminal Statutes—were discovered, the trial judge conducted a hearing to determine if the books had influenced the jury's verdict. At the hearing, each of the jurors was individually questioned by the court and counsel. The responses revealed that none of the jurors had read any of the statutes applicable to the present case nor had any reference been made to the books during the jury's deliberations. In these circumstances, the district court properly concluded that petitioner had not been prejudiced.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Acting Assisting Attorney General.
ROGER A. PAULEY,
GEORGE S. KOPP,
Attorneys.

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